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No. .....

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In The
Supreme Court of the United States
October Term, 1984

RICELAND FOODS, INCORPORATED,

Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO-CLC, LOCAL 2381, AND UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the District Court erred in its failure to find that the arbitrator exceeded his authority by basing his decision and award upon his view of the requirements of the occupational safety and health act, rather than an interpretation of the collective bargaining agreement.

II.

Whether an arbitrator may enforce a provision of a contract in a manner which arguably requires a violation of federal law.

III.

Whether the District Court erred in its failure to find that the arbitrator's decision and award exceeded the limitations placed upon his authority by the collective bargaining agreement.

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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO-CLC, LOCAL 2381, AND UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Riceland Foods, Inc.[1] respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

[1] Wholly and partially owned subsidiary cooperatives of Riceland Foods, Inc. are listed in Appendix D.

Eighth Circuit entered without opinion in this proceeding on December 10, 1985.

OPINIONS BELOW

The opinion of a panel of the United States Court of Appeals for the Eighth Circuit, which was vacated by operation of law upon grant of the petition for rehearing *en banc,* appears in Appendix B hereto, and is reported at 737 F.2d 758 (8th Cir. 1984).

The opinion of the United States District Court for the Eastern District of Arkansas appears in Appendix A, and is not reported in any official reporter. The Court of Appeals *en banc* voted four-to-four, resulting in affirmance of the district court's opinion, and no opinion was announced by the full Court. The Court's Order is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, in the form of an Order *en banc* in which the judgment of the District Court was affirmed by an equally divided Court, was issued on December 10, 1984. This petition was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:[2]

United States Code, Title 29:

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor oganizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

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[2] 28 U.S.C. §§ 1254(1), 2201 and 2202 are jurisdictional in nature, and accordingly were not set forth separately herein.

Code of Federal Regulations, Title 29:

§ 1910.134 Respiratory protection.

(a) *Permissible practice.* (1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirements.

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

(3) The employee shall use the provided respiratory protection in accordance with instructions and training received.

(b) *Requirements for a minimal acceptable program.* (1) Written standard operating procedures governing the selection and use of respirators shall be established.

(2) Respirators shall be selected on the basis of hazards to which the worker is exposed.

(3) The user shall be instructed and trained in the proper use of respirators and their limitations.

• • •

(c) *Selection of respirators.* Proper selection of respirators shall be made according to the guidance of American National Standard Practices for Respiratory Protection Z88.2-1969.

• • •

(e) *Use of respirators.* (1) Standard procedures shall be developed for respirator use. These should include all information and guidance necessary for their proper selection, use, and care. Possible emergency and routine uses of respirators should be anticipated and planned for.

(2) The correct respirator shall be specified for each job. The respirator type is usually specified in the work procedures by a qualified individual supervising the respiratory protective program. The individual issuing them shall be adequately instructed to insure that the correct respirator is issued.

(3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or in emergencies. Personnel shall be familiar with these procedures and the available respirators.

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(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

(ii) Providing respiratory protection for individuals, wearing corrective glasses is a serious problem. A proper seal cannot be established if the temple bars of eye glasses extend through the sealing edge of the full facepiece. As a temporary measure, glasses with short temple bars or without temple bars may be taped to the wearer's head. Wearing of contact lenses in contaminated atmospheres with a respirator shall not be allowed. Systems have been developed for mounting corrective lenses inside full facepieces. When a workman must wear corrective lenses as part of the facepiece, the facepiece and lenses shall be fitted by qualified individuals to provide good vision, comfort, and a gas-tight seal.

(iii) If corrective spectacles or goggles are required, they shall be worn so as not to affect the fit of the facepiece. Proper selection of equipment will minimize or avoid this problem.

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STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. §185, and, in that a declaratory judgment was sought vacating an arbitrator's award, 28 U.S.C. §§2201 and 2202. The dispute arose when plaintiff below, Riceland Foods, Inc. (Riceland), a soybean processor located in Stuttgart, Arkansas, discharged four employees. These employees, by refusing to shave their beards, had refused to comply with the requirements of a respirator program put into effect by Riceland on April 1, 1980, as a result of an Occupational Safety and Health Act citation.

On August 23, 1979, an ammonia leak had occurred in the department where two of the discharged employees worked. Because of some apparent deficiencies in the breathing apparatus that had been used during that occurrence, one of the employees (James Shelton, then president of the Union which was defendant below) complained to the Little Rock OSHA office. An investigation led to a citation, but because Riceland had already begun implementation of a respirator program which it completed shortly thereafter, the citation was reduced to a non-serious category. The program implemented was discussed with the Respondent Unions in advance, and its provisions were made known to all employees.

The program required, among other things, that employees who worked in certain designated areas where use of a respirator was anticipated should be clean shaven on that portion of the facial area where the face mask of the respirator must seal against the face. The program contained a progressive disciplinary procedure for employees

who refused to shave, and who chose not to accept the employer's offer to transfer to another area. If he did not accept the transfer, the employee faced a three-day suspension, and then discharge, for refusal to shave.

On March 21, Shelton attempted to file a grievance challenging the shaving requirement. The grievance was refused because the program was not then in effect. Shelton also requested a 30-day delay in implementation of the program, in order to have a "neutral third party" determine whether being clean shaven was necessary in all cases to obtain an adequate face mask seal. The Company denied this request.

On April 4, 1980, the four employees were suspended for three days for refusing to shave. They were discharged for their continued refusal on April 7. Their subsequent grievance claimed that the company violated the "just cause" provision of the collective bargaining agreement regarding discharge, as well as the agreement's section concerning safety and health. The grievance sought remedy in the form of reinstatement and "that the company allow all the employees with facial hair a chance to properly fit the SCBA unit before the company determines that a beard or sideburns will not let it fit properly."

After processing of the grievance without resolution, an arbitrator was selected, and a hearing was held on July 24, 1980. The Arbitrator, Mr. A. Q. Sartain,[3] issued his decision and award on September 11, 1980, in which

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[3] Mr. Sartain is a retired college professor and an experienced arbitrator. He is not a lawyer.

he sustained the grievance and required Riceland to reinstate the employees to their former jobs with back pay and no loss of seniority rights. He expressly found that the grievants violated the agreement by their failure to "obey now" and rely upon the grievance. Based upon that finding, he penalized each grievant one month loss of pay. In doing so he identified a distinct and separate contract violation and imposed discipline according to his own view of what was appropriate for the new offense. At the same time, he found that the company lacked "just cause" for the discharges, because the rule being enforced was not, in his opinion, reasonable.

Riceland filed the instant complaint pursuant to Section 301 of the National Labor Relations Act, seeking a declaratory judgment vacating the award. Riceland contended that the arbitrator had exceeded his authority under Article 4 of the collective bargaining agreement, or that his decision did not draw its essence from that agreement, and further argued that the decision was contrary to the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.*), and against public policy. In support of its opposition to the Union's motion for summary judgment, Riceland produced proof by way of the deposition testimony of OSHA officer Dean Wesley McDaniel that it was the policy of OSHA to cite an employer for allowing employees to wear tight-fitted respirators with beards or facial hair growth that extend under the facepiece (DX p.29, l 16, p.30, l 12, p.39, l 3, p.41, l 12). While it is true that the arbitrator did not have the benefit of this particular testimony, the Issue was clearly before him, and (or) it was clearly before the district court. That court, after waiting almost two years to decide the case,

held that the company's request to vacate the award should be denied, and granted summary judgment in favor of the Union.

On Appeal to a panel of the Eighth Circuit Court of Appeals, the district court was reversed. The panel reasoned that the arbitrator's award had not drawn its essence from the agreement, but rather had violated certain express limitations therein.[4] The Unions sought to be heard *en banc.* Upon the granting of that motion the panel decision was vacated as a matter of law, and the resulting tie vote (4-4) by the full court resulted in affirmance of the district court without opinion.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Has Resolved An Important Question Of Federal Law In A Manner Contrary To The Previous Rulings Of This Court.

This Court has spoken most recently on the subject of the enforcement of arbitral awards in (*W. R. Grace and Company vs. Local 759, Int'l Union of Rubber Workers,* 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)). There the Court reaffirmed its longstanding rule concerning the scope of review of federal courts in suits brought under §301 (29 U.S.C. §185), as set forth in the "Steelworkers Trilogy." *United Steelworkers of America v.*

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[4] In so ruling, the panel noted that it needn't address or resolve the issues of whether the company rule was "reasonable" or whether the decision was contrary to OSHA.

American Manufacturing Company, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). The holdings of these cases can be distilled as providing that federal courts must uphold an arbitrator's award as long as it "draws its essence" from the collective bargaining agreement and is not repugnant to the specific command of some law or against public policy. *Enterprise Wheel, supra* at 596-7.

In the instant case, the arbitrator's opinion clearly meets the criteria necessary to require federal court intervention. First, the collective bargaining agreement at issue provides, at Section 4 or Article 4, that

> "The arbitrator shall have no power to alter, amend, change, add to, or subtract from any of the terms of this Agreement, but shall determine only whether or not there has been a violation of this Agreement within the allegations set forth in the grievance. The decision of the arbitrator shall be based solely upon the evidence and arguments presented to him by the respective parties at such arbitration meeting.
>
> *Section 5.* This Agreement constitutes a contract between the parties which shall be interpreted and applied by the parties and by the arbitrator in the same manner as any other contract under the laws. The function and purpose of the arbitrator is to determine disputed facts upon which the application of the Agreement depends. The arbitrator shall, therefore, not have authority, nor shall he consider it his function, to include the decision of any issue not submitted or to so interpret or apply the Agreement as to change what can fairly be said to have been the intent of the parties as determined by generally accepted rules of contract construction. The arbitrator

shall not give any decision which in practical or actual effect modifies, revises, detracts from or adds to any of the terms or provisions of this Agreement.

Section 6. The arbitrator shall not render any decision or award or fail to render any decision or award, merely because in his opinion such decision or award is fair or equitable. *Any arbitration with respect to the exercise of a right to discharge or discipline under the provisions of Article 7 shall be limited to the question of whether or not there was just cause or whether or not the working rules were violated, and shall not include whether or not the type of discipline selected was appropriate."* (Emphasis added).

The arbitrator, therefore, by express contractual agreement, had no power to alter the discipline under the circumstances presented here. If a contract violation was determined (and it was[5]), then the agreement provides that the inquiry should end there. It does not allow an arbitrator to find a violation of the contract by a grievant and then declare that the violation did not constitute just cause for discharge. All that the decisions of this Court are designed to do is provide finality and contractual strength to the industrial arbitration system. They do not authorize judicial abdication in the event of a contract violation. It is not enough that the arbitrator couches his decision in contract terms such as "just cause." He must avoid dispersing "his own brand of industrial justice" by simply parrotting the relevant contract provisions while expressly and openly violating the agreement.

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[5] In his Award at p. 10 (Appendix E), the arbitrator expressly rules: "[u]nder the circumstances I find that the Contract required [the grievants] to obey now. . . . Hence because the Grievants did violate the Contract the Union's requested remedy cannot be granted *in toto*."

Enterprise Wheel, supra. Here, therefore, the Court must find that the arbitrator exceeded his authority. If not, then the precedent set here is that there is no way contractually that an employer (or employee, for that matter) can protect itself from arbitral excesses. If the instant provision won't suffice, then recourse to the federal courts is not merely a final, deferential step, it is a meaningless gesture.

The decision below not only violates express language from the Steelworkers Trilogy, but it imposes upon Riceland an unacceptable dilemma: In order to comply with the award, the Company must violate Section 5(a) (2) of the Occupational Safety and Health Act. Regulations pursuant to that law require the company to maintain safety rules requiring compliance with the Act and its standards, including disciplinary measures progressively leading to discharge. Specifically, 29 CFR 1910.134(e) (5) (i) provides that conditions such as the growth of a beard may prevent a proper seal on a respirator.[6] The company determined that, rather than risk a potential seal failure under use conditions, it was better to impose a strict, "clean-shaven" rule. The arbitrator found this rule to be "unreasonable." Yet his charge under the agreement was only to determine *whether* a rule or the contract had been violated; having so found, he could not go further and determine the punishment that he believed was proper under the circumstances. Both the rule and the punishment

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[6] The arbitrator had before him the reported testimony of an OSHA officer, the findings of the manufacturer of the equipment, and an independent study, all tending to confirm the safety risk in anything less than a "clean-shaven" rule. (Appendix E, p. 9) He chose to ignore all of that.

for violations thereof are retained to the managerial discretion of Riceland by Article 6, Section 1 of the collective bargaining agreement.

It has long been held that the presumption of arbitrability of *Enterprise Wheel* is limited, so that award enforcement will be denied if it "compels violation of law or conduct contrary to accepted public policy. . . ." *Gulf States Telephone Co. v. Local 1692, International Brotherhood of Electrical Workers,* 416 F.2d 198, 201 (5th Cir. 1969). Moreover, as this Court reaffirmed most recently in *McDonald v. City of West Branch,* — U.S. —, 104 S.Ct. 1799 (1984), an arbitrator's expertise is the law of the shop, not the law of the land. An arbitrator's authority derives *solely* from the collective bargaining agreement, and his authority to construe and enforce federal statutes is quite limited. If his decision "is based 'solely upon the arbitrator's view of the requirements of enacted legislation', rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of submission' and the award will not be enforced." *Id.* at 309, citing *Enterprise Wheel* at 597. In the instant case the arbitrator, under the guise that he was determining the "reasonableness" of the employer's rule, effectively decided that OSHA required something different than the employer thought it required. In so doing, the arbitrator unavoidably strayed too far from the scope of submission, and in effect substituted his judgment of the requirements of federal law for that of the employer. This he cannot do. If this Court allows this decision to stand, then all that will be necessary to circumvent the cautionary language in the Steelworker's Trilogy concern-

ing the bounds of arbitral authority is for the arbitrator to couch his decision in terms that appear to relate to "just cause" or other legitimate contractual considerations. If the Eighth Circuit's *en banc* affirmance is to be interpreted as broadly as its decision in *United Electrical Radio & Machine Workers v. Litton Microwave Cooking Products, Litton Systems Inc.*, 728 F.2d 970 (8th Cir. 1984), then no arbitration award can be set aside under the *Trilogy*. Petitioner believes that this Court intended a "hands off" policy within certain well-defined limits, and not a policy of judicial abdication through blind deference to the magic of the arbitrator's wand.

This Court in *W. R. Grace* considered the limits of a federal court's power to overrule an arbitrator's decision when the arbitrator has relied solely on the collective bargaining agreement, and has refused to consider other contractual commitments made by the company which were in conflict with that agreement. The Court held that, so long as the arbitrator's award is founded in contract interpretation, it cannot be disturbed. The Court also considered the dilemma of a company when its commitments under the collective bargaining agreement conflict with the consent decree of a federal district court. But there, unlike here, the company had voluntarily entered into a consent decree which was contrary to the bargaining agreement. There, unlike here, the arbitrator restricted his opinion to the agreement, defining his powers very narrowly. There, unlike here, the contract breach was independent of any act or decision by the arbitrator.

In the instant case, the arbitrator, while claiming to leave the respirator program open to further resolution, determined that OSHA did not require a clean-shaven rule. He must have done so, in order to declare Rice-

land's rule to be "unreasonable." His view was that the Company had reached the conclusion that OSHA regulations required the rule based upon too little evidence—clearly a decision that the company's view of the law was wrong. Assuming that he did so because of lack of information, the district court had no such limitation. At the court's request, the petitioner produced evidence through the deposition testimony of an OSHA officer that OSHA's current policy was to cite an employer for allowing employees to wear tight-fitting respirators with beards or facial hair growth that extend under the facepiece; that while a test fit may be obtained with the respirator in question, under use conditions a bearded employee's mask would leak; that fit-test methods are invalid in predicating leakage under use conditions; and that pressurization of the mask would cause it to lift on the facial hair, resulting in leakage. Thus, the court had sufficient evidence before it from which it could determine that the arbitrator had incorrectly resolved an issue that was beyond the scope of his authority to determine in the first place. Moreover, the court was in a position at the time to determine that the arbitrator's award required the company to accept and comply with an obviously incorrect interpretation of federal law. By enforcing the award, the district court abrogated its responsibility to uphold federal law and public policy. See, e.g., *Gulf States Telephone Co. v. Local 1692, Int'l Brotherhood of Electrical Workers,* 416 F.2d 198, 201 (5th Cir. 1969); *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1128-29, n.27 (3d Cir. 1969). In so doing, the court placed deference to the "private law of the shop" above the federal law and regulations protecting the health and safety of workers. That has not been the law in this country since *Hurd v. Hodge,*

334 U.S. 24 (1948) and it is not the law after *W. R. Grace, supra.*

II. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals On The Enforceability Of Arbitral Awards That Violate Law Or Public Policy.

Although a completely clear statement of the Eighth Circuit's position on this issue was not forthcoming, the failure to address the issue implies that it was resolved unfavorably to the Petitioner. In its penultimate *en banc* decision on a similar issue, the Court of Appeals read *W. R. Grace, supra,* quite restrictively, as though it stands only for the proposition of complete judicial deference to arbitration. *United Electrical, Radio and Machine Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc.,* 728 F.2d 970 (8th Cir. 1984). The instant decision appears to allow that deferential rule to apply even in the face of a violation of law or public policy. The other circuits take a different view.

Although no cases have been found dealing expressly with a conflict between OSHA and an arbitral award, the cases are legion which refuse to enforce awards in the face of violations of other law. *Hurd v. Hodge, supra* at 35; *Muschany v. United States,* 324 U.S. 49, 66 (1965).

The Fifth Circuit has ruled that it could not direct enforcement of an award if to do so might affirmatively cause the employer to commit an unfair labor practice. *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.,* 579 F.2d 1282, 1291 (5th Cir. 1978). In more recent cases that may arguably be distinguishable as applying to federal sector rather than private sector arbitration, the Federal and D. C. Circuits have expressly

followed the rule that an arbitrator is not free to issue—nor a court to enforce—an award which conflicts with "external law" such as federal statutes or regulations. *Devine v. Nutt,* 718 F.2d 1048, 1055 (Fed. Cir. 1983); *Devine v. White,* 697 F.2d 421 (D. C. Cir. 1983).

The First Circuit in *United States Postal Service v. American Postal Workers Union,* 736 F.2d 822, 824 (1st Cir. 1984) upheld a district court's refusal to enforce an arbitrator's award reinstating a postal employee who had been terminated for embezzling postal funds. The Court read *W. R. Grace* as continuing in full force the rule against enforcing awards which violated public policy. The Ninth Circuit, apparently in agreement with the First that the law on this issue has not changed as a result of *W. R. Grace,* ruled in *United Food and Commercial Workers Union v. Alpha Beta Company,* 936 F.2d 1371, 1376 (9th Cir. 1984) that "a court cannot compel arbitration if a contract clause on its face violates federal labor law or is contrary to federal labor policy." And the Seventh Circuit, while finding no violation of law to have been proved, spoke approvingly of the holdings in *W. R. Grace* and *General Warehousemen, supra,* as setting forth the rule that illegal awards may not be enforced by federal courts. That Court also held that when an arbitrator goes outside the collective bargaining agreement to his "own ideas of right and wrong", he has exceeded his authority and a court should not enforce the award. *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO,* 739 F.2d 1159, 1162 (7th Cir. 1984). By direct analogy, if the arbitrator's views of right and wrong are founded upon his own untrained and erroneous construction of federal law, the award is no less unenforceable.

It is Petitioner's belief that there are other circuits in which this case would have been resolved differently even if no violation of OSHA had resulted from the award. The extreme deference to arbitration decisions displayed by the Eighth Circuit is, in Petitioner's view, a much more restrictive view of a federal court's power than is seen in such cases as *Monongahela Power Co. v. Local No. 2332, International Brotherhood of Electrical Workers,* 566 F.2d 1196, 1198-99 (4th Cir. 1976); or *Grand Rapids Die Casting Corp. v. Local Union No. 159, UAW,* 684 F.2d 413 (6th Cir. 1982) (District Court made a "heroic effort" to ground the arbitrator's award in the agreement, when a fair reading showed otherwise. *Id.* at 415-16.); *accord, Sears, Roebuck & Co. v. Teamsters Local Union No. 243,* 683 F.2d 154, 155 (6th Cir. 1982).

III. The Decision Below Conflicts With Other Decisions On The Same Issue Within The Eighth Circuit.

As Petitioner has previously stated, it is not absolutely clear what the Eighth Circuit's view now is, in light of the fact that the method of affirmance—a tie-vote—resulted in the affirmance of an opinion by a district court holding that "the Court cannot say that the essence of the award is not drawn from the agreement" (Appendix B), and further that "enforcement of the award would not necessarily require plaintiff [petitioner] to violate OSHA regulations and so it is not against public policy." (*Id.*) By allowing those findings to stand, the Court of Appeals has tacitly approved them.

The Eighth Circuit's opinions on these issues are obviously split, as was the *en banc* Court itself. The dis-

senters in *United Electrical, Radio and Machine Workers, supra,* at 973, cited *Truck Drivers Helpers Union, Local 784 v. Ulry-Tolbert Co.,* 330 F.2d 562, 564-65 (8th Cir. 1964) and *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6,* 715 F.2d 405 (8th Cir. 1983) as being contrary to the holding in *United Electrical Workers.* As viewed by the dissenting panel, "[t]his case, in tandem with *Lackawanna Leather Co. v. District Union No. 271, United Food & Commercial Workers,* 706 F.2d 228 (8th Cir. 1983) (en banc), effectively eliminates any judicial review over the concededly broad powers of arbitrators." *Id.* at 974. Petitioner believes that criticism applies to the instant decision with equal force. But, unlike *United Electrical Workers,* in the instant case we have a clear allegation that the award is unenforceable as against public policy, but we have no explanation of whether the deference to an arbitrator's law of the shop, as seen in *United Electrical* and *Lackawanna Leather,* should apply to an arbitrator's interpretation of the law of the land. We assert it should not.

—o—

CONCLUSION

The trial court ignored both clear evidence and its judicial responsibility when it ruled that the arbitrator had correctly interpreted the law. The panel decision, 737 F.2d 759, correctly ruled that the award should not be enforced, and so did not reach the question regarding the conflict with OSHA regulations. The *en banc* Court, by its four-to-four vote, reinstated the erroneous decision of the district court, without explanation. Petitioner

earnestly requests that, for all of the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

BILL S. CLARK*
WALTER A. PAULSON II
2000 First National Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Petitioner
**Counsel of Record*

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

No. PB-C-80-314

RICELAND FOODS, INC.

Plaintiff,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO-CLC, LOCAL 2381 AND UBC, SOUTHERN COUNSEL OF INDUSTRIAL WORKERS

Defendants

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 4-22-83 by E. Fleaman.

ORDER

(Filed April 22, 1983)

Plaintiff filed this suit on September 29, 1980, seeking to have portions of an arbitrator's decision and award which sustained the grievance and awarded the grievants reinstatement and back pay vacated. Defendants answered and filed a counterclaim asking that the arbitrator's award be enforced and that they be awarded a reasonable attorney's fee and costs. Defendants filed a motion for summary judgment on November 21, 1980; plaintiff responded to the motion and a hearing was held before this Court on March 19, 1981; the parties submitted post-hearing briefs and the evidentiary deposition of Dean McDan-

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iel, an Occupational Safety and Health Administration (OSHA) official, was filed on June 2, 1981.

The problem at issue first arose on March 7, 1980, when plaintiff revised and posted a new respirator program to comply with the requirements of OSHA and certain safety and health standards promulgated thereunder. The program became effective on April 1, 1980. When four of the employees refused to comply with the provisions of the program requiring them to be clean shaven on the facial area where the face mask of the respirator seals against the face or be transferred to another department, progressive disciplinary action was taken resulting in those employees' termination on April 7, 1980. The defendants, the unions of which those employees were members, filed a grievance on April 7, 1980, alleging that plaintiff had violated Articles 7 and 13 of the Collective Bargaining Agreement by the suspension and termination of those employees. A hearing was held on July 24, 1980, before an arbitrator selected by the parties, and following the submission of briefs, the arbitrator issued his decision and award on September 11, 1980.

The arbitrator found that the issues before him were whether there was just cause for discharging the four employees and if not, what was the remedy. Since the matter before the arbitrator was a discharge case, he found that the plaintiff had the burden of proof and the obligation of establishing that its program regarding the facial hair of the employees was fair, reasonable, and contractual. He found that plaintiff did not establish the propriety of its action by the preponderance of the evidence test much less the beyond a reasonable doubt test frequently

imposed in discharge cases. The arbitrator found that the discharges were greatly influenced by plaintiff's interpretation of the OSHA regulation that a growth of a beard may be a condition that would prevent a good seal and the remarks of Jones of OSHA and Sullivan, a supplier of the Survivair face mask. The arbitrator found that the OSHA regulation did not say that a beard would always, or even usually, prevent a good face seal and that one employee had stated that he had a good seal when testing the face masks for a seal during a demonstration. Regarding Jones and Sullivan, neither was established at the hearing as an expert, only their purported oral statements were presented, no relevant written documents were submitted, and there was no opportunity for questioning by either the arbitrator or the defendants. Further, the arbitrator noted that the plaintiff had made no effort to check on practices in its other divisions, on comparable provisions in competitive companies, on what was done by employers in other industries where ammonia is comparably used, or on scientific and engineering findings relating to the good fit on which it quite properly insisted. Plaintiff violated the contract when it failed to make such a good faith search before the employees' jobs were put in jeopardy. To plaintiff's argument that subsequent research which it presented at the hearing established its position, the arbitrator found that what was presented was not conclusively in its favor. He questioned whether the experience of fire departments transferred directly to plaintiff's demands and found the Los Alamos report was not convincing, virtually standing alone. Moreover, plaintiff apparently singled out facial hair for special attention while failing to put comparable emphasis on other

interfering factors such as eyeglasses, contact lenses, and dentures that are equally important.

Finding that the plaintiff had not met its burden of establishing just cause for the discharges, the arbitrator next addressed the "self-help" charge against the employees for refusing to obey plaintiff's policy by shaving and then grieve plaintiff's position. The arbitrator found that the exceptions to the "obey now, grieve later rule" were not present here and that the contract required the employees to obey the plaintiff's policy and to later file a grievance.

Since the employees did violate the contract by their "self-help", the arbitrator found that defendants' requested remedy for the employees could not be granted *in toto*. He directed that the employees were to be restored to their prior positions without loss of pay, seniority, or fringe benefits except for a loss of pay for one month for their failure to follow relevant contractual provisions. Finally, the arbitrator noted that he was not required to make suggestions as to where that decision left the parties regarding a respirator program and the future use by the employees of the Survivair. He clearly stated that his decision was limited to the facts and issue presented by the situation before him.

Plaintiff's position before this Court is that the essence of the arbitrator's decision and award is not drawn from the collective bargaining agreement since the decision violated Article 4 by changing the method of discipline given to the employees for their "self-help" and violated Article 6 which gave plaintiff the sole discretion to promulgate and enforce a respirator program that was

not found to be unreasonable. Plaintiff further asserts that the award is against public policy since it prevents plaintiff from furnishing its employees with a safe and healthful place to work and if enforced, will force plaintiff to violate OSHA.

Defendants contend that the award does draw its essence from the agreement. They argue that the plaintiff failed to establish the justness of the discharges based on the disobedience of which was found to be invalid respirator regulations and since plaintiff's self-help theory was only one component of a complete defense to the discharges, the total defense failed. The finding that the discipline imposed for violating an unreasonable and noncontractual rule was unjustified drew its essence from the just cause provision of the contract. Finally, the arbitrator did not suggest that plaintiff could not promulgate a reasonable, fair and contractual program, only that employees could not be discharged for violating unreasonable, unfair and noncontractual portions of the program. Thus, defendants conclude that plaintiff is not required to violate OSHA, merely to promulgate a program encompassing the OSHA regulation in its entirety rather than in an inconsistent and incomplete manner.

The judicial standard for reviewing arbitration decisions is found in the Steelworkers Trilogy. The interpretation of the collective bargaining agreement is for the arbitrator. The Court cannot substitute its judgment on the merits of both the law and facts of the claim for that is the matter for the arbitrator to decide. The Court's role in reviewing the arbitration decision is to determine whether the award draws its essence from the collective bargaining agreement. If the essence of the arbitrator's award

is drawn from the agreement, the Court must enforce the award whether it agrees with the arbitrator's interpretation of the agreement.

After carefully reviewing the award and the agreement, the Court cannot say that the essence of the award is not drawn from the agreement. The arbitrator adopted the defendants' framing of the issue before him as being whether there was just cause for discharging the four employees. He found that plaintiff had not met its burden of demonstrating that there was just cause and so the discharges could not be upheld. In determining that there was not just cause, the arbitrator, taking into account the contract provisions regarding the rights of plaintiff in promulgating work rules and safety regulations, found that the plant rule regarding facial hair and respirator use to be unsupported by the evidence presented to him and unreasonable under the circumstances. Under his interpretation of the contract, the employees could not be discharged for just cause for violating what was an invalid policy. Finding that there was not just cause for the discharges, the arbitrator next addressed the remedy. The arbitrator interpreted the limiting language of Article 4, Section 6 on the arbitrator's lack of authority to determine the appropriateness of the type of discipline selected, not to be operative once he had found no just cause existed for discharging the employees under that same section. The Court cannot say that such an interpretation is not drawn from the essence of the agreement. His decision that the self-help charge against the employees did not constitute an independent violation of the contract constituting just cause for discharge, however, did not prevent him from concluding that their refusal to

obey and grieve later would prevent defendants' requested relief *in toto*. Thus, his remedy for the employees was reinstatement with full seniority and back pay except for one month following their discharge.

Since the arbitrator has not clearly exceeded the scope of his authority under the collective bargaining agreement, the Court could refuse to enforce the award only if the award required the commission of an illegal act or violated public policy. The Court was concerned at the hearing on the issue of whether enforcement of the award would violate public policy or force plaintiff to violate OSHA regulations. The Court finds and agrees with defendants that the focus of the arbitrator's inquiry was on construction and application of the contractual standard of just cause, not upon formulation of valid work rules regarding respirator use. The arbitrator made it clear at both the beginning and conclusion of the substantive discussion of the award that his award was only on the issue of just cause presented to him under the facts and circumstances. He was careful not to rule on a respirator policy outside of the scope presented to him. The language and analysis of the award do not prohibit the plaintiff from ever instituting a respirator program that would comply with OSHA regulations. He found from the evidence presented to him that plaintiff had failed to demonstrate that OSHA regulations required an absolute prohibition against facial hair in all instances of respirator use, as provided by plaintiff's rule, and that the plaintiff had failed to do adequate investigations before concluding that a good facial respirator fit could only be insured by a rule completely prohibiting facial beards. He did not hold that the necessity for such an absolute

prohibitive rule could never be convincingly demonstrated, nor did he direct plaintiff to permit facial beards regardless of their effect on obtaining a good facial fit. He only found that the policy in question was inconsistent and without foundation so that the employees could not be discharged for violating the unreasonable, unfair, and non-contractual portions of the program. Given the narrow scope of the award, enforcement of the award would not necessarily require plaintiff to violate OSHA regulations and so it is not against public policy. The Court will follow the example of the arbitrator in not deciding unnecessary issues such as advising the parties on any future respirator programs.

Although defendants have requested an award of attorney's fees, the Court finds that bad faith on the part of the plaintiff has not been demonstrated and that an award of fees is not appropriate.

Accordingly, the Court finds that defendants' motion for summary judgment should be, and it is hereby, granted.

IT IS SO ORDERED this 21st day of April, 1983.

George Howard, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1619

Appeal from the United States District Court for the Eastern District of Arkansas

Riceland Foods, Inc.,

Appellant,

v.

United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC, Local 2381 and UBC Southern Council of Industrial Workers,

Appellees.

Submitted: January 12, 1984

Filed: June 27, 1984

Before ROSS, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Riceland Foods, Inc. (Riceland), a soybean processing company, appeals from a judgment of the District Court[1] enforcing an arbitration award in favor of United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC, Local 2381 and UBC, Southern Council of Industrial Workers (the Unions). The District Court ruled that the arbitrator's award drew its essence from the col-

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[1]The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

lective bargaining agreement and, therefore, granted summary judgment in favor of the Unions[2]. We reverse.

On August 23, 1979, an ammonia leak occurred in one of Riceland's departments. Two employees, James Shelton and William Campbell, were assigned the job of locating and repairing the leak. Shelton subsequently protested to officials of the Occupational Safety and Health Administration (OSHA) that Riceland failed to provide exits from the work area and an adequate respirator. OSHA ordered Riceland to correct the latter problem. *See* 29 C.F.R. § 1910.134(c), (e)(5) (OSHA regulations regarding the use of respirators). Because Riceland already was investigating a new respirator program, OSHA issued a non-serious citation. *See* 29 U.S.C. § 658; 29 C.F.R. § 1903.14.

Riceland implemented a training program for use of the new respirator, a self-contained breathing apparatus (SCBA). A subsequent management directive stated, in part:

> 1. To assure a standard program, all employees who have need to wear the SCBA . . . in performance of their job will be required *to be clean shaven on the facial area where the face mask seals against the face.* Any other conditions, such as, a skull cap that projects under the face piece, temple pieces of eyeglasses, absence of one or both dentures, etal (sic), that would prevent a seal between the facial surface and mask sealing surface shall be checked and corrected during training.

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[2]Riceland also argues that the grievance did not raise the reasonableness of the rules of the respirator program and that because the decision is contrary to the Occupational Safety and Health Act of 1970, it is against public policy. Because of our resolution of this case, we need not address these other Riceland contentions.

2. No one is authorized to use the SCBA unless he or she has had proper training.

Designated Record (D.R.) at 35. (emphasis added). An additional memorandum provided that employees who did not want to comply with the conditions for wearing the SCBA would be offered available jobs not requiring certification for wearing the SCBA. *Id.*

Four employees, James Shelton, William Campbell, Merlin Brenneman, and Rick Gibson, declined to follow these new safety rules by refusing to shave. They also refused to transfer to another work area. Riceland laid these employees off for three days and then discharged them. As a result, the Unions invoked the grievance and arbitration procedure established by their collective bargaining agreement with Riceland.

The arbitrator determined that the issues before him were whether there was just cause for discharging the four grievants and, if there was no just cause for the discharges, what was the remedy. After a hearing, he concluded that Riceland had not established that the safety rule regarding facial hair was fair, reasonable, and contractual. Therefore, the arbitrator required Riceland to reinstate the grievants to their former jobs with back pay and no loss of seniority rights. But the arbitrator also found that the grievants had violated the collective bargaining agreement by failing to follow the "obey now, grieve later" rule and penalized each of them with a loss of pay for the month following their discharges.

Reviewing courts rarely set aside arbitration awards. In this case, however, we believe that the award does not "draw its essence" from the collective bargaining agree-

ment. *See generally W. R. Grace & Co. v. Local 759, Int'l. Union of Rubber Workers,* 103 S.Ct. 2177, 2182 (1983); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960) (hereinafter *Enterprise Wheel & Car Corp.*); *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6,* 715 F.2d 405, 407 (8th Cir. 1983).

The collective bargaining agreement between the parties expressly limits the authority of the arbitrator. For example, "Article 4: Arbitration" provides, in part:

> *Section 4.* The arbitrator shall have no power to alter, amend, change, add to, or subtract from any of the terms of this Agreement, but shall determine only whether or not there has been a violation of this Agreement within the allegations set forth in the grievance . . . .
>
> *Section 6.* The arbitrator shall not render any decision or award or fail to render any decision or award, merely because in his opinion such decision or award is fair or equitable. *Any arbitration* with respect to the exercise of a right to discharge or discipline under the provisions of Article 7 shall be limited to the question of whether or not there was just cause or whether or not the working rules were violated, and *shall not include whether or not the type of discipline selected was appropriate.*

D.R. at 10-11. (Emphasis added). The arbitrator expressly found that the grievants violated the agreement by failing to obey Riceland's rule: they refused to shave as required if they were to be certified to wear the SCBA, and they refused reassignment to another work area where the SCBA would not be needed. Nonetheless, he mitigated the discipline selected by Riceland. This was con-

trary to the express language of Sections 4 and 6, *supra*. *See St. Louis Theatrical, supra; Truck Drivers & Helper's Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964). Because the arbitrator was not authorized to evaluate the propriety of the discipline selected by Riceland, the District Court should have granted summary judgment in favor of Riceland. After all, "[an arbitrator] does not sit to dispense his own brand of industrial justice." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (1960).

The Unions rely heavily on the arbitrator's conclusion that Riceland's shaving rule was unreasonable. This reliance is misplaced because the reasonableness of the shaving rule is irrelevant. If the employees had obeyed the rule and followed grievance procedures, it would be a different case—the central issue before the arbitrator would have been the reasonableness of the rule; there would not have been a question about the employees' behavior. But here the employees simply flouted the rule, which was intended to protect their health and safety in accordance with OSHA policy.[3]

The Unions also rely on two cases in which the arbitrator interpreted the scope of a clause providing for discharge for "sufficient cause" and for "proper cause." *See Vulcan-Hart Corp. v. Stove, Furnace & Allied Appliance Workers Int'l Union Local No. 110*, 671 F.2d 1182 (8th Cir. 1982); *Kewanee Machinery Division v. Local Union No. 21, International Brotherhood of Teamsters,*

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[3]We express no opinion on whether the reasonableness of the rule is an appropriate issue, within the terms of the collective bargaining agreement, for resolution by the arbitrator.

593 F.2d 314 (8th Cir. 1979). In those cases the employees were discharged for insubordination and for absences. Neither case confronted the problem of an express provision removing the discipline selected by the employer from the arbitrator's consideration. Similarly inapplicable is *United Electrical, Radio and Machine Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc.*, 728 F.2d 970 (8th Cir. 1984) (en banc) in which the issue presented was the appropriate remedy against an employer who had breached the collective bargaining agreement. In the instant case, we are faced with an arbitrator's alteration of the discipline selected by Riceland notwithstanding his conclusion that the employees had breached the agreement. The arbitrator exceeded his authority and violated the express terms of the collective bargaining agreement when he altered the discipline.

The judgment of the District Court is reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1619

Appeal from the United States District Court for the Eastern District of Arkansas

Riceland Foods, Inc.,

Appellant,

v.

United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC, Local 2381 and UBC Southern Council of Industrial Workers,

Appellees.

Submitted: September 13, 1984

Filed: December 10, 1984

Before HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges. EN BANC.

O R D E R

This case has been heard by the Court en banc. Judges Ross, McMillan, John R. Gibson, and Bowman would affirm the panel opinion and reverse the District Court judgment. Judges Heaney, Bright, Arnold, and Fagg would reverse the panel opinion and affirm the District Court judgment. Therefore the judgment of the District Court is affirmed by an equally divided Court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

WHOLLY AND PARTIALLY OWNED SUBSIDIARY COOPERATIVES OF RICELAND FOODS, INC.

Stuttgart Grain Drying Cooperative
P.O. Box 106
Stuttgart, AR 72160

Lonoke Grain Drying Cooperative
P.O. Drawer I
Lonoke, AR 72086

Wheatley Grain Drying Cooperative
P.O. Box 389
Brinkley, AR 72021

Jonesboro Grain Drying Cooperative
P.O. Box 220
Jonesboro, AR 72401

Hickory Ridge Grain Drying Cooperative
P.O. Box 517
Hickory Ridge, AR 72347

McGehee Grain Drying Cooperative
P.O. Box 260
McGehee, AR 71654

Hazen Grain Drying Cooperative
P.O. Box 376
Hazen, AR 72064

Fair Oaks Grain Drying Cooperative
P.O. Box 237
Fair Oaks, AR 72397

Weiner Grain Drying Cooperative
P.O. Box 335
Weiner, AR 72479

Des Arc Grain Drying Cooperative
P.O. Drawer "D"
Des Arc, AR 72040

Dumas Grain Drying Cooperative
P.O. Box 668
Dumas, AR 71639

Corning Grain Drying Cooperative
P.O. Box 434
Corning, AR 72422

East Arkansas Grain Drying Cooperative
P.O. Box 36
Parkin, AR 72373

Tuckerman Grain Drying Cooperative
Drawer "A"
Tuckerman, AR 72473

Lee County Grain Drying Cooperative
P.O. Box 793
Marianna, AR 72360

White County Grain Drying Cooperative
P.O. Box 376
Bradford, AR 72020

Mississippi River Grain Drying Cooperative
P.O. Box 398
Elaine, AR 72333

Delta Grain Drying Cooperative
P.O. Box 938
Clarksdale, MS 38614

Arkansas River Valley Grain Drying Cooperative
P.O. Box 605
Morrilton, AR 72110

Hope Grain Drying Cooperative
P.O. Box 664
Hope, AR 71801

Eudora Grain Drying Cooperative
P.O. Box 599
Eudora, AR 71640

Griffithville Grain Drying Cooperative
P.O. Box 44
Griffithville, AR 72060

Jackson County Grain Drying Cooperative
P.O. Box 1
Newport, AR 72112

The Farmers Cooperative Elevator Company
P.O. Box 346
DeWitt, AR 72042

APPENDIX E

EXHIBIT A

Grievance No. AA33

Dated Apr. 7, 1980

Signed by Larry Fortune

FMCS No. 80K17944

* * * * *

RICELAND FOODS, INC.
Stuttgart AR

and

UBC, SOUTHERN COUNCIL OF
INDUSTRIAL WORKERS
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

(AFL-CIO-CLC)

LOCAL UNION NO. 2381

* * * * *

Hearing held in Stuttgart County Court House, Stuttgart AR, July 24, 1980. A. Q. Sartain, Arbitrator, selected in accordance with FMCS procedures. There is no objection to publication and no question as to the arbitrability of the Grievance. Posthearing briefs were to be postmarked by Aug. 22, 1980, but due to an error in Postal-service delivery one was not received until Sept. 5, 1980.

THE ISSUE

[*As proposed by the Company*] Did the employees involved violate the safety rules and regulations with re-

spect to the Respiratory Program as promulgated by the Company?

[*As proposed by the Union*] Was there just cause for discharging the four individuals?

The Arbitrator determines that the Union's proposal is the proper statement of the Issue since the Company apparently assumes the propriety of cited safety rules and regulations whereas whether or not they are themselves in accordance with the Contract between the Parties is found to be a part of the Issue.

To the above there is also added, "If not, what is the remedy?"

RELEVANT PORTIONS OF THE AGREEMENT BETWEEN THE PARTIES

(Dated Aug. 1, 1979)

ARTICLE 6 MANAGEMENT RIGHTS

Section 1. In order to operate its business, the Employer, in its sole discretion, retains and shall have the following exclusive rights:

1. To determine the number, location and types of plants, to change the types of plants, to move in whole or in part the location of the plants;

14. To establish and make known work rules and safety rules for all of the employees;

19. To otherwise generally manage the business, direct the work force, and establish terms and conditions of employment.

The above rights are not all-inclusive, but indicate the type of matters or rights which belong to and are inherent to the Management.

Section 3. All other traditional rights of management are also expressly reserved to the Employer and the express provisions of this Agreement constitute the only limitations upon the Employer's exclusive right to manage its business.

ARTICLE 7 DISCIPLINE OR DISCHARGE

Section 1. The Employer shall have the right to discharge or discipline an employee for just cause. The employee shall be advised as promptly as possible in person by the Employer of the reason or reasons for such discharge or disciplinary action. A Union steward shall be present at any disciplinary action, if possible.

ARTICLE 8 *Section 2* Included in the reasons for which an employee shall lose his seniority . . . are the following:

. . . .

(b) Discharge for cause.

ARTICLE 13 SAFETY AND HEALTH

Section 1. Each employee is responsible for observing all safety rules and regulations and for conducting himself at all times in such a way that neither he nor his fellow employees are subject to injury.

Section 2. All work related accidents or incurred injuries must be reported to the supervisor as soon as possible under the circumstances.

Section 3. The Company will furnish ear protection, eye protection, and protective head equipment as the job requires, as determined by the Employer. All equipment furnished by the Employer must be returned upon termi-

nation of employment. The Employer will replace worn equipment, but will not be responsible for equipment lost or stolen.

Section 4. There shall be a Safety Committee established in the plant to be known as the Plant Safety Inspection Committee. The Plant Safety Inspection Committee shall be comprised of one or more members of the Bargaining unit on each shift, to be selected by a majority vote of all employees on each shift. Such elections will be held quarterly. In the event no employee is selected in this manner, the Company may designate an employee to serve on this committee from that shift. The Company and bargaining unit representative of the Plant Safety Inspection Committee on each shift shall make periodic inspections. They shall report on forms furnished by the Company, all unsafe operations for working conditions immediately to the Shift Supervisor available at the time, for corrections.

REPRESENTATIVES OF THE PARTIES

The Company

Mr. Bill S. Clark, Attorney
Friday, Eldredge & Clark, Little Rock

Witnesses

Mr. Giles Colbert, Division Manager, Stuttgart Soybean Division
Mr. Herrold Hanson, Instrument Superintendent
Mr. William Bennett, Superintendent of Hydro Packaging and Shipping
Mr. Max Montgomery, Processing Superintendent
Mr. Rick Wood, Superintendent, Granular Lecithin Plant

Mr. Terry Richardson, Personnel Director
Mr. Charles Shrum, Maintenance Supervisor, Hydro Packing
Mr. James Mason, Vice President and General Manager, Riceland Rice Mill

The Union

Mr. Phillip E. Kaplan, Attorney
Mr. W. Michael Hamilton, Attorney
Kaplan, Brewer & Bilheimer, Little Rock

Witnesses

Mr. James Shelton, Grievant, Local Union President, and Maintenance Employee
Mr. Clifford Stephens, Votator Operator
Mr. O. C. Johnson, Maintenance Employee
Mr. Fred Mullins, Votator Operator
Mr. William Campbell, Grievant and Maintenance Employee
Mr. Merlin Brenneman, Grievant, Union Secretary, and Maintenance Employee
Mr. Rick Gibson, Grievant and Employee of the Lecithin Plant

Also Present

Mr. Don Rogthe
Mr. Joe Dixon

Recorded by Ms. Pearl B. Pennington

BACKGROUND

There is little argument concerning the basic facts in this case though the Parties differ sharply in their assessment of the meaning of some of them.

The Company operates a soybean-processing division in Stuttgart. It is larger than most such operations, carrying the manufacturing processes further than most do. Riceland also has other plants including those for the

processing of rice, but in operation the instant one is apparently independent of them.

The present Grievance arose in a department of the plant which was involved in a considerable amount of freezing of the product, primarily by the use of ammonia under higher-than-usual pressure.

On Aug. 23, 1979 an ammonia leak occurred in the department and two of the Grievants, namely Messrs, Shelton and Campbell, were assigned to determine the nature of the leak and to repair it. It was found to be in a ¼-inch line on the top of a 40-foot tank, but the Grievants were unable to reach it, according to their testimony, because of the heavy concentration of ammonia. Subsequently Supervisor Shrum did succeed in finding the nature of the leak though it is not clear whether this was before or after a reduction in the pressure on the line and time for the gas to "clear out." Shelton and Campbell later repaired it.

Shortly after the break Shelton called the OSHA office in Little Rock to protest, according to Union testimony, the Company's failure to provide proper exits from the work area and also an adequate sort of respirator. The Company was subsequently ordered to correct the last of these matters.

Earlier, in March 1979, the Company had requested an inspection by the Arkansas Department of Labor, OSHA Division. As a result of the findings of the latter, the Company began the development of a respirator program designed to lead to the abandonment of its older type of mask, which employed a filter through which the air passed before being breathed, and its substitution by one which

supplied its own compressed air (a self-contained breathing apparatus often referred to as *SCBA* or a positive-pressure device).

This program was under way in August, 1979 and a respirator called the Survivair, capable of supplying up to 30 minutes of air, had been adopted. A new five-minute respirator, for immediate emergencies, had also replaced an older one.

Subsequent to the above complaint filed by Shelton the Company received a "non-serious citation" from OSHA. The evidence indicates that the charge would have been a "serious" one if it had not been for the existence of the above program.

After the arrival of the Survivair, demonstrations of its use were held and many supervisors and employees, including at least some of the Grievants, attended. At these meetings several of them, including Shelton, put on the unit and reported they "got a fit" (that is, the face mask sealed against their faces and permitted no outside air to enter).

A "Resuscitator Program" was then formulated by the Company and posted throughout the plant. It called out the employees whose duties were such that they might be called upon to use the Survivair and ordered their training in its use. Included in a subsequent March 7th Management Directive was the following:

1. To assure a standard program, all employees who have need to wear the SCBA (See Section I, Item J) in performance of their job will be required to be clean shaven on the facial area where the face mask seals against the face. Any other conditions, such as, a

skull cap that projects under the face piece, temple pieces of eyeglasses, absence of one or both dentures, et al, that would prevent a seal between the facial surface and mask sealing surface shall be checked and corrected during training.

2. No one is authorized to use the SCBA unless he or she has had proper training.

And a Memorandum of March 14 provided that

6. Those employees who do not meet the conditions established for wearing the Self Contained Breathing Apparatus and who do not want to make changes that will enable them to meet the standard conditions will be offered any available comparable or other job where the certification for wearing the SCBA is not a job requirement.

7. This program will become effective on April 1, 1980.

It was apparently the intention of the Company that an employee must, in the judgment of his supervisor, be properly shaven before he could take the training, but at least Shelton, among the Grievants, was given the training, and according to both the Grievant and the Management representative involved, again succeeding in achieving a satisfactory seal without meeting shaving standards.

At first there were a number of employees who could not meet the Company's "hair test" but by Apr. 1st they were reduced to four in number, namely the Grievants named above. When they refused to shave "properly" and asserted that they were not interested in bidding into another job each was laid off for three days and subsequently discharged.

On Apr. 7, 1980 the Grievants filed Grievance No. AA33, the principal part of which reads as follows:

Date Grievance Occurred Tuesday April 1, 1980 Friday April 4 and Monday April 7

Nature of Grievance The Company on the dates above suspended and terminated James Shelton, William Cambell, Marlin Brenneman, And Rich Gibson for not being clean shaven.

The Company has violated Article (7) Article (13) of the Contract.

The Company has violated Title (7) of the Equal Employment Opportunity Act.

The Company has violated OSHA.

Adjustment Desired We ask that the Company reinstate these Employees with all back pay and Benefits. We also demand that the Company allow all the Employees with Facial hair a chance to properly fit the SCBA Unit before the Company determines that a Beard or Sideburns will not let it fit properly

Prior to the above events, on Mch. 21 Shelton attempted to file Grievance No. AA32 protesting the Mch. 14th Memo cited above and asking for the Company to "rescind [it] for 30 days or until such time that OSHA is allowed to determine wheather [sic] or not that the Company has violated Article 7 and Article 13." Colbert refused to accept it on the ground that it would not be timely until the program was actually implemented, a position in which the Executive Secretary of the Southern Council of Industrial Workers subsequently concurred.

In the hearing there was considerable discussion of the OSHA position and findings relative to the use of respirators. In particular the Parties disagreed as to the meaning and implications of the following [from 31:5802 of S-131 OSHA Standards—Subpart I, 1910.133,(e)(5)]:

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

(ii) Providing respiratory protection for individuals wearing corrective glasses is a serious problem. A proper seal cannot be established if the temple bars of eye glasses extend through the sealing edge of the full facepiece. As a temporary measure, glasses with short temple bars or without temple bars may be taped to the wearer's head. Wearing of contact lenses in contaminated atmospheres with a respirator shall not be allowed. Systems have been developed for mounting corrective lenses inside full facepieces. When a workman must wear corrective lenses as part of the facepiece, the facepiece and lenses shall be fitted by qualified individuals to provide good vision, comfort, and a gas-tight seal.

(iii) If corrective spectacles or goggles are required, they shall be worn so as not to affect the fit of the facepiece. Proper selection of equipment will minimize or avoid this problem.

After the Grievance was denied by Management in the various steps of the grievance procedure it was appealed to this hearing.

POSITION OF THE COMPANY

The Company contends as follows: An important point is two prior arbitration awards, including 77-1 ARB §8272 (E. H. Conant, Arbitrator—May 16, 1977), which is almost completely parallel to the instant set of facts and in which the decision was in favor of the employer. This arbitrator concluded that the presented expert evidence justified the rule as to required shaving, that it was applied in such a way as not to prohibit all facial hair but only to preventing a hazard, that Management had the right to promulgate reasonable safety rules such as this was, and that the action met the test of reasonableness. While precedent is not as such binding on an arbitrator the Company is sure that "the [present] Arbitrator will be persuaded that [this case] is entitled to great weight" (Co. Brief, p. 9).

A second point of significance is the resort of the Grievants to self-help. In all circumstances such as the ones with which we are here concerned, if an employee disagrees with a Management decision his/her proper course of action is to "obey now and later, if desired, to grieve." The unwillingness of the Grievants "to endure even a temporary loss of facial hair or to work in a comparable job" completely nullifies their entire contention, and thus becomes a sufficient basis for denying the Grievance.

It is clear in the third place that the labor Agreement and in particular Article 6, Sections 1-3, and Article 13 give the Company the right to do what it did. [Article 6.1.14 specifically covers this point.]

Thus in spite of Union contentions to the contrary, the Company at all times "acted in a prudent and reasonable manner" (p. 14), and hence all claims as to any unreasonableness or arbitrariness in the disputed rules must be rejected. Company Exhibit 15, citing a study from the Los Alamos Laboratory "supports the Company's position. It proves the OSHA regulation is correct in that employees with beards may not consistently obtain a seal. The article is very definitely proof that the Company's shaving regulation is reasonable under all the facts and circumstances" (p. 17).

Thus because (1) Management had the right to do as it did; (2) it was reasonable and consistent in what it did; and (3) the self-help resorted to was in direct violation of the Contract between the Parties, the Grievance should be denied. The last point is particularly important because as Union President Shelton "had a duty to make certain that the grievance and arbitration procedure was followed" (p. 25).

POSITION OF THE UNION

The Union contends as follows: The Company's actions toward Shelton in particular and the other Grievants as well were arbitrary in the extreme. For one thing, even after being earlier cited by OSHA "a five and one-half month period passed during which nothing was accomplished by the Company to comply with the . . . directives" (Un. Brief, pp. 2-3). For another, both Shelton and Stephens, "who himself shaves infrequently," tried on the SCBA unit "and determined that it fit properly in the presence of [Supervisor] Shrum." Though the latter admitted these two had passed this test Colbert decided

that "employees with a beard couldn't pass the SCBA test." Incidentally this decision was applied to Shelton, but nothing was ever said to Stephens about the four or five day growth of beard which he always maintains" (p. 3).

An additional consideration is the widespread belief that "Colbert was making employees shave because they called OSHA" (pp. 3-4), an opinion in which at least one member of Management explicitly concurred.

Furthermore,

> "Colbert refused to accept the grievance saying it was untimely because the program had not been implemented and refused to grant the Union's request for an extension of time on implementation of the program or for an examination by a neutral third party. (T.260-61, 276). Colbert then angrily told Shelton that, 'He would be clean-shaven everyday or he would send him home.' (T.267-277)."

> "On March 21, 1980, Shelton attempted to file a grievance challenging the shaving requirement of the respirator program. (T.259, Union Ex. #2). Shelton explained to Colbert that the Union wanted a 30-day delay in implementation of the program in order to have a neutral third party determine whether being clean-shaven was necessary to obtain an adequate face mask seal. Shelton indicated to Colbert that if being clean-shaven was determined to be necessary for a proper fit, he would be the first to shave. (T. 260-261, 276)." (p. 4).

The Union agrees at once that Management has the right to "promulgate legitimate, reasonable rules to insure the safety of its employees" and also the right to discharge for just cause. However, with regard to the shaving rule it "is so unreasonable and inconsistent that a refusal to

comply [with it] cannot constitute just cause for discharge." Actually "the evidence . . . clearly establishes that the only conceivable reason for promulgating such a rule . . . was to retaliate against the Union because President Shelton complained to OSHA about the Company's safety violations" (p. 5).

Cross examination of Company witnesses revealed (1) no reasonable basis for the above 5½-month delay; (2) an acknowledgment that only the individual employee could really determine whether he "got a fit" with the mask—as all the Grievants did; (3) that the shaving rule was the only "absolute rule" in the Company program, though OSHA gives it no greater significance than that given to a great many other conditions, all of which the Company virtually ignored (the wearing of glasses, contact lenses, and dentures being examples); (4) that certain Operations employees who "would require the use of SCBA units "were not even made a part of the program; and finally (5) that the manufacturer's instructions relative to the use of the Survivair contain "absolutely no reference to facial hair" (p. 8).

It is also significant that employees at other Company units are required to wear SCBA units but none of them have a "shaving rule."

Examination of the Company-cited arbitration cases reveal that in one OSHA had determined that the particular individual could not get a fit with his hair pattern and in the other the manufacturer's instructions made specific recommendations concerning facial hair.

The Grievance should therefore be sustained.

DISCUSSION

One result always desired by an arbitrator is to make a decision that in effect disposes finally of the matters at issue. At the same time an arbitrator must be careful "not to decide too much," that is, not to cover more than the issue or issues of the case determines to be in dispute between them. Hence at times matters on which the Parties may wish an answer are not properly before the Arbitrator and should not be decided, perhaps an decision for lack of sufficient evidence.

The above considerations are decidedly relevant to the instant case. On the one hand, it must be pointed out that the Company did not succeed in establishing that its program regarding the facial hair of the Grievants was fair, reasonable, and Contractual. But on the other hand, neither did the Union evidence nor the evidence of the hearing taken as a whole prove that such a program was not proper. The point is that since this was a discharge case the Company had the burden of proof and hence the obligation to establish its case, failing which the Issue must be answered in the negative.

Certainly Company evidence did not establish the propriety of its action beyond a reasonable doubt, the test frequently imposed in discharge case. But it did not do so even by the preponderance of evidence test. For one thing, the discharges were apparently greatly influenced by Management interpretation of (1) the OSHA regulation which says that growth of beard *may be* [emphasis added] a condition preventing "a good face seal"

but nowhere does it say that it will always or even usually do so; and (2) remarks of a Mr. Jones of OSHA and a Mr. Sullivan of the supplier of the Survivair. But neither Mr. Jones nor Mr. Sullivan was established in this hearing as an expert in this matter. Besides I had before me only what purported to be oral statements made by them, no relevant written documents being submitted, and obviously no opportunity being provided for their questioning by the Arbitrator or cross-examination by the Union.

In addition, as of the date of the discharge Management had admittedly made no effort to check on practice in other Riceland divisions or on comparable provisions in competitive companies or on what was done by employers in other industries where ammonia is comparably used, nor on scientific and engineering findings relating to the "good fit" on which it quite properly insisted. I do not know what such an inquiry as the above would reveal—maybe nothing of value to either Party—but the Company violated the Agreement when it failed to make such a good-faith search before putting the Grievants' jobs in jeopardy.

Even though the Company had not made extensive investigations as of the date of the discharges, it maintained in this hearing that subsequent research established its position. While ordinarily proceedings such as the instant one prohibit evidence that arises subsequent to the complained-of action the practice is not universal. Hence the Company might be able to show that its decision was in fact correct even though at the time it had not obtained all the supporting facts. But even if *arguendo* one agrees that in this case the Company might properly present

such facts as it has subsequently discovered, what it did present was not conclusively in its favor. For one thing, it is questionable that experience with respirators in Camden and El Dorado fire departments transfers directly to demands on Mechanical Employees in this Company and no effort was made to show how representative of fire-fighting practice it was. And the Los Alamos study, while interesting and relevant, could hardly be found to be final evidence. For one thing, it concerned in part if not principally the filter type of respirator rather than the SCBA. Indeed a sentence on the top of p. 142 of the report, where U.S. Navy practice is cited, can be read to say a different set of considerations may be involved with the SCBA. And for another, the report finds that there are many kinds of "hair styles" and of individuals, and at least by implication cautions against overgeneralizations. I do not want to be misunderstood: the referenced report helped the Company's case and an additional amount of such evidence, some hopefully much more specific, might have established it. But standing virtually alone, the Los Alamos report was not convincing.

The Union was also correct in charging that the Company apparently "singled out" facial hair for special attention while failing to put comparable emphasis on other interfering factors equally important.

But now just as I find the Company failed to carry its "just cause" burden of proof as to the discharges, so I conclude that the Union failed to establish its contention that the discharges occurred as a result of attempts to "get even" for the filing of OSHA charges. Some of the Union assertions and inferences as to Company motives

appeared to be plausible, but the Company was vigorous in its denial, sufficiently so that the Union clearly failed to meet the burden of proof it carried with regard to its charges.

There remains the "self-help" charge against the Union. Here the Company is found to have been on sound ground, though not by the clear margin it urged. Arbitrators are uniform, so far as I know, in their allegiance to the "obey now, grieve later rule," but all would admit there are exceptions to it. One is the potential jeopardy of the employee and/or other people. Another is any requirement of felonious or even merely illegal behavior. Additionally there are probably circumstances where an order is so clearly unreasonable or humiliating or violative of a moral or ethical code that one should not insist that it be followed.

As regards whether a man's rights concerning his style of facial hair fall into the "jeopardy" or "illegal" classifications, it is hard to even imagine such instances, but there may be circumstances where they fall into the third category. However, they are not found to do so for any of these four Grievants. Important as his hair style might have seemed to each individual, there was no showing, for example, that shaving to the extent the Company required would have subjected any one of them to prolonged public ridicule or violated any moral or religious belief or seriously damaged their self-esteem. Under the circumstances I find that the Contract required them to obey now and later, if they wished, permitted them to grieve. Hence because the Grievants did violate the Contract the Union's requested remedy cannot be granted *in toto*.

It is therefore determined that the Grievants are to be restored to their prior positions without loss of pay, seniority, or fringe benefits except that because of their failure to follow the relevant Contractual provisions they are to suffer a loss of pay for one month following the respective discharges. From the back pay due each Grievant the Company may deduct for any personal earnings and/or unemployment compensation properly received and retained after the expiration of the one-month period.

It is tempting at this point to make suggestions as to where this decision leaves the Parties with regard to the respirator program and the future use by the Grievants of the Survivair. However, as noted above the Issue of this case does not require me to do so. Furthermore because I have made a determination as to the Issue as stated, including one as to the proper remedy, I see no need to, and I do not, retain any future jurisdiction over this case.

AWARD

Thus Grievance No. AA33, dated Aug. 7, 1980 and signed by Mr. Larry Fortune, is hereby (1) *sustained* to the extent that each of the Grievants is to be restored to his prior position without loss of back pay (except as provided below), seniority, and/or fringe benefits, and (2) *denied* to the extent that each of the Grievants is to suffer the loss of back pay for a period of one month following his discharge.

/s/ A. Q. Sartain
Arbitrator

AQS/ms
Dallas, Texas
September 11, 1980